

1 **Education Cabinet**

2 **Kentucky Board of Education**

3 **Department of Education**

4 **(Amendment)**

5 **707 KAR 1:340. Procedural safeguards and state complaint procedures.**

6 RELATES TO: KRS 157.200, 157.220, 157.224, 157.226, 157.230, 157.250, 157.260,
7 157.270, 157.280, 157.285, 157.290, 157.360, 158.030, 158.100, 158.150, 160.290, 20
8 U.S.C. § 1221(e), 20 U.S.C. § 1400-1419, 34 CFR 300.1-300.662.

9 STATUTORY AUTHORITY: KRS 156.070(1), 156.160, 157.220, 157.224, 157.260,
10 and 167.015.

11 NECESSITY, CONFORMITY, AND FUNCTION: KRS 157.200 to 157.290 establish
12 the statutory framework for special education programs in local school districts. KRS
13 157.220 mandates that the Kentucky Board of Education adopt rules and administrative
14 regulations to generally carry out these programs. KRS 156.035 sets forth the authority
15 of the Kentucky Board of Education to implement any act of Congress appropriating
16 funds to the state and to provide for the proper apportionment and disbursement of these
17 funds in accordance with state and federal laws. 20 U.S.C. 1400 et.seq. and 34 C.F.R.
18 Part 300 require that policies and procedures be adopted to assure the apportionment and
19 disbursement of federal funds for exceptional children programs in accordance with
20 applicable laws. This administrative regulation establishes procedural safeguards for
21 children with disabilities and their parents and lists the requirements for filing a written

1 complaint.

2 Section 1. Parent participation in meetings. (1) A parent of a child with a disability shall
3 be afforded an opportunity to:

4 (a) inspect and review all education records with respect to identification, evaluation, and
5 educational placement of the child and the provision of FAPE to the child; and

6 (b) participate in all ARC meetings concerning his child.

7 (2) A LEA shall provide parents a written notice of ARC meetings in accordance with
8 this administrative regulation.

9 (3) A LEA may conduct an ARC meeting without a parent in attendance if the LEA is
10 unable to convince the parent to attend. The LEA shall keep a record of its attempts to
11 arrange a mutually agreed on time and place. These records may include:

12 (a) detailed records of telephone calls made or attempted and the results of those calls;

13 (b) copies of correspondence sent to the parents and any responses received; and

14 (c) detailed records of visits made to the parent's home or place of employment and the
15 results of those visits.

16 (3) LEA staff shall not be limited by 707 KAR Chapter 1, from having informal,
17 ~~[scheduled,]~~ or unscheduled conversations on issues that may include:

18 (a) teaching methodology ~~[if those issues are not addressed in the child's IEP;]~~

19 (b) lesson plans ~~[if those issues are not addressed in the child's IEP;]~~

20 (c) coordination of service provision ~~[if those issues are not addressed in the child's IEP;]~~

21 or

22 (d) preparatory activities that LEA personnel engage in to develop a proposal or response
23 to a parent proposal that will be discussed at a later ARC meeting.

Section 2. Independent educational evaluation. (1) A parent of a child with a disability shall have a right to obtain an independent educational evaluation of the child.

(2) Upon receiving the request, the LEA shall provide information to the parent about where an independent educational evaluation may be obtained and the LEA's applicable criteria for independent educational evaluations.

(3) The parent's request for an independent educational evaluation shall be subject to the following:

(a) the LEA shall be given the opportunity to conduct a complete evaluation on the child prior to the request;

(b) upon receiving the request the LEA shall, without unnecessary delay:

1. initiate a due process hearing to show that its evaluation is appropriate; or

2. ensure that an independent educational evaluation is provided at public expense unless the LEA demonstrates in a due process hearing that the evaluation obtained by the parent did not meet LEA criteria;

(c) the LEA may ask for the parent's reasons why he objects to the LEA's evaluation; however, the parent shall not be required to respond and the LEA shall not delay its action under subsection (b) while waiting for a response from a parent; and

(d) if an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the LEA uses when it initiates an evaluation. Aside from these criteria, the LEA shall not impose any other conditions or timelines relating to obtaining an independent educational evaluation at public expense.

(e) A parent shall be entitled to only one independent educational evaluation at public

1 expense each time the public agency conducts an evaluation with which the parents
2 disagree.

3 (4) If the LEA initiates a due process hearing after receiving a request for an independent
4 educational evaluation, and the final decision is that the LEA's evaluation is appropriate,
5 the parent still shall have the right to an independent educational evaluation, but not at
6 public expense.

7 (5) If the parent obtains an independent educational evaluation at public private expense
8 and it meets the agency criteria, results of the evaluation shall be considered by the LEA
9 in any decision made with respect to the provision of a free appropriate public education
10 (FAPE) to the child.

11 (6) If a due process hearing officer, as part of a hearing, request an independent
12 educational evaluation, the cost of the evaluation shall be at public expense.

13 Section 3. Notice to parents. [~~of Procedural safeguards.~~] (1) A LEA shall provide written
14 notice to the parents of a child with a disability a reasonable time before the LEA:

15 (a) proposes to initiate or change the identification, evaluation, or educational placement
16 of the child or the provision of FAPE to the child; or

17 (b) refuses to initiate or change the identification, evaluation, or educational placement of
18 the child or the provision of FAPE to the child.

19 (2) This notice shall include:

20 (a) a description of the action proposed or refused by the LEA;

21 (b) an explanation of why the LEA proposes or refuses to take the action;

22 (c) a description of any other options that the LEA considered and the reasons why those
23 options were rejected;

- 1 (d) a description of each evaluation procedure, test, record, or report the LEA used as a
2 basis for the proposed or refused action;
- 3 (e) a description of any other factors that are relevant to the LEA's proposal or refusal;
- 4 (f) a statement that the parents of a child with a disability have protection under the
5 procedural safeguards in 707 KAR Chapter 1 and 34 CFR Section 300.504, if this notice
6 is not an initial referral for evaluation, the means by which a copy of the procedural
7 safeguards can be obtained; and
- 8 (g) sources for the parents to contact to obtain assistance in understanding the provisions
9 of this section.

10 (3) The notice shall be written in language understandable to the general public and
11 provided in the native language or other mode of communication of the parent unless it is
12 clearly not feasible to do so. If the native language of the parent is not a written
13 language, the LEA shall take steps to ensure that the notice is translated orally or by other
14 means so that the parent understands the content of the notice and that there is written
15 evidence of this translation.

16 Section 4. Procedural safeguards. ~~(4)~~ (1) A copy of the procedural safeguards (e.g.,
17 parent's rights) shall be given to the parents of a child with a disability:

- 18 (a) upon initial referral or parent request for evaluation;
- 19 (b) upon the receipt of the first state written complaint;
- 20 (c) upon the receipt of the first filing of a due process hearing;
- 21 (d) in accordance with the discipline procedures in which a decision is made to remove a
22 student that constitutes a change in placement because of a violation of the code of
23 student conduct; and

1 (e) upon request by a parent.

2 ~~[(b) upon invitation of each ARC meeting;~~

3 ~~(c) upon reevaluation of the child; and~~

4 ~~(d) upon receipt of a request for a due process hearing.]~~

5 (2) [(5)] The procedural safeguards notice shall include a full explanation of all the
6 procedural safeguards available under 707 KAR Chapter 1 and 34 CFR Section 300.504.

7 Section 5. [4] Parental consent. (1) A LEA shall obtain informed parental consent before
8 conducting an initial evaluation or reevaluation and before the initial provision of
9 specially designed instruction and related services.

10 (2) If the parent of a child with a disability refuses to consent to the initial evaluation or
11 fails to respond to a request to provide consent, the LEA may pursue the initial evaluation
12 by using the procedures in 707 KAR 1:340 for mediation, dispute resolution meeting, or a
13 due process hearing. However, the LEA shall still be considered to be in compliance
14 with 707 KAR 1:300, Section 4 and 707 KAR 1:310 if it declines to pursue the
15 evaluation.

16 (3) If the child is in the custody of the state and is not residing with the child's parent,
17 the LEA is not required to obtain consent from the parent for initial evaluations to
18 determine the eligibility of the child if:

19 (a) despite reasonable efforts, the LEA cannot discover the whereabouts of the parent;

20 (b) the rights of the parent have been terminated by a court of competent jurisdiction; or

21 (c) the rights of the parent to make educational decisions have been subrogated by a court
22 of competent jurisdiction and an individual appointed by the court to represent the child
23 has given consent to the initial evaluation.

1 (4) If the parent of a child refuses to give consent for the provision of initial specially
2 designed instruction and related services or fails to respond to a request for consent, the
3 LEA shall not provide such services and shall not use a due process hearing or mediation
4 procedures in order to obtain agreement or a ruling that the services may be provided to
5 the child.

6 (5) The LEA shall obtain consent for reevaluation of a child with a disability. If the
7 parent refused to consent, the LEA may pursue the reevaluation by using the procedures
8 in 707 KAR 1:340 for mediation, dispute resolution meeting, or a due process hearing.

9 (6) Parental consent for reevaluation shall not be required if the LEA can demonstrate
10 that:

11 (a) it made reasonable efforts to obtain such consent and follows the procedures in
12 Section 1 (3)(a), (b), and (c) to show those efforts; and

13 (b) the parent failed to respond.

14 (7) Parental consent shall not be required before:

15 (a) reviewing existing data as part of an evaluation or reevaluation; or

16 (b) administering a test or other evaluation that is administered to all children unless
17 consent is required of all parents before the administration of the test or evaluation.

18 (8) If the parent of a child fails to respond or refuses to consent to a request for
19 evaluation, reevaluation or to consent for services:

20 (a) the LEA shall not be considered to be in violation of the requirements to make a free
21 appropriate public education available to the child; and

22 (b) the LEA shall not be required to convene an ARC meeting or develop an IEP.

23 ~~[(2) If a parent of a child with a disability refuses consent for an initial evaluation or a~~

reevaluation, the LEA may continue to pursue those evaluations by requesting a due process hearing, or using the mediation procedures.

(3) Parental consent shall not be required for reevaluation if the LEA can demonstrate that it has taken reasonable measures to obtain the consent, and the child's parent has failed to respond. To show the reasonable measures taken, the LEA shall keep documentation, which may include:

- (a) the records of the telephone calls made or attempted and the results of those calls;
- (b) copies of correspondence sent to the parents and any responses received; and
- (c) records of the visits made to the parent's home or place of employment and the results of those visits.]

Section 6. Representation of children. (1) If the child is a foster child and does not reside with the child's parents, the LEA shall make reasonable efforts to obtain the informed consent of the parent for an initial evaluation. The LEA shall not be required to obtain this consent if:

- (a) the whereabouts of the parents cannot be determined after reasonable efforts have been made to do so;
- (b) the rights of the parents have been terminated in accordance with state law; or
- (c) the rights of the parents to make educational decisions have been subrogated by a court in accordance with state law and the consent for initial evaluation has been given to someone appointed by the judge to represent the child.

(2) The biological or adoptive parent, when attempting to act as the parent and when more than one party is qualified under 707 KAR 1:280 (43) to act as parent, shall be presumed to be the parent for purposes of 707 KAR Chapter 1 unless the biological or

adoptive parent does not have the legal authority to make educational decisions for the child. If there is a judicial order that identifies a specific person or persons under 707 KAR 1:280 (43) (a) – (d) to act as the parent of a child or to make educational decisions on behalf of a child, the order shall prevail.

(3) A LEA shall ensure the rights of a child are protected by determining an educational representative for the child. A LEA shall appoint a surrogate parent to make educational decisions for the child if:

(a) no parents as defined in 707 KAR 1:280 can be identified;

(b) a LEA, after reasonable efforts, cannot discover the whereabouts of the parents;

(c) the child is a ward of the state; or

(d) the child is an unaccompanied homeless youth as defined in the McKinney-Vento Homeless Assistance Act, 42 U.S.C. Section 11431 et.seq.

(4) A LEA shall have a procedure for determining whether a child needs a surrogate parent for assigning a surrogate parent to the child. The surrogate parent of the child shall have all the rights afforded parents under Part B of IDEA, 34 C.F.R. Part 300 and 707 KAR Chapter 1, to make decisions about educational issues for a child.

(5) A LEA shall have a procedure for selecting surrogates. A surrogate:

(a) shall not be an employee of the Kentucky Department of Education, the LEA, or any other agency that is involved in the education or care of the child;

(b) shall not have an personal or professional interest that conflicts with the interests of the child; and

(c) shall have knowledge and skills that ensure adequate representation of the child.

(6) A person who is otherwise qualified to be a surrogate parent shall not be considered

1 an employee of the LEA solely because he or she is paid by the LEA to serve as a
2 surrogate parent.

3 (7) In the case of a child who is an unaccompanied homeless youth, appropriate staff of
4 emergency shelters, transitional shelters, independent living programs, and street
5 outreach programs may be appointed as temporary surrogate parents without regard to the
6 criteria listed in (4) above until a surrogate parent can be appointed that meets all the
7 requirements of this section.

8 (8) A LEA shall make reasonable efforts to ensure the assignment of a surrogate not more
9 than thirty (30) days after there is a determination by the LEA that the child needs a
10 surrogate.

11 (9) The surrogate parent may represent the child in all matters relating to the
12 identification, evaluation, and educational placement of the child and the provision of
13 FAPE to the child.

14 (10) When a child with a disability reaches the age of majority, all rights under 707 KAR
15 Chapter 1 shall transfer from the parents to the child, unless the child has been declared
16 incompetent under KRS Chapter 387 in a court of law. A LEA shall notify the child with
17 a disability and the parents of the transfer of the rights.

18 Section 7. ~~[45.]~~State complaint procedures. (1) The following procedures shall apply to
19 the Kentucky Department of Education as to written complaints submitted pursuant to 34
20 CFR 300.660 through 300.662:

- 21 (a) a time limit of sixty (60) days after a complaint is filed to carry out an independent
22 investigation, if necessary;
23 (b) an opportunity by the complainant and the LEA to submit additional information

about any allegation in the complaint;

(c) an opportunity for the LEA to respond to the complaint including, at least:

1. a proposal to resolve the complaint; and

2. an opportunity for the parent who has filed the complaint and the LEA to voluntarily engage in mediation;

(d) [(e)] a review of all relevant information; and

(e) [(d)] a written decision addressing each allegation in the complaint containing the findings of fact and conclusions and the reasons for the final decision.

(2) Any organization or individual including someone from outside the state may file a signed written complaint under this administrative regulation.

(3) The complaint shall include:

(a) a statement that the LEA or other public agency providing educational services to identified students has violated a requirement of 707 Chapter 1 or IDEA regulations;

(b) the facts on which the statement is based; ~~[and]~~

(c) a signature and contact information for the complainant;

(d) name and residence of the child, or contact information is the child is homeless under the McKinney-Vento Homeless Assistance Act, 42 U.S.C. Section 11431 et. seq.;

(e) name of the school the child is attending;

(f) a description of the nature of the problem, including facts related to the problem;

(g) a proposed resolution of the problem to the extent it is known and available to the complainant at the time of the filing; and

(h) information indicating that the violation did not occur more than one year prior to the date of the receipt ~~[filing]~~ of the complaint, ~~[unless a longer period is reasonable because~~

~~the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three (3) years prior to the date of the complaint.]~~

(4) The party filing the complaint shall forward a copy to the LEA.

(5) [(4)] The complainant, parent or the LEA shall have a right to appeal the written decision from a complaint to the Commissioner of the Kentucky Department of Education. This appeal shall be filed within fifteen (15) business days of the receipt of the decision.

(6) [(5)] The Kentucky Department of Education shall allow an extension of the time limit under Section (1)(a) only if exceptional circumstances exist or if the parent and the LEA agree to extend the time line to engage in mediation or other alternative means of dispute resolution.

(7) [(6)] The Kentucky Department of Education shall ensure the final decision from a complaint shall be effectively implemented. To achieve compliance, the Department of Education may apply:

- (a) technical assistance activities;
- (b) negotiations; or
- (c) corrective actions.

Section 8. [5.] Right to mediation and due process hearings. (1) A LEA and parent of a child with a disability shall have the right to request mediation from the Kentucky Department of Education to resolve any disputes that may arise under 707 KAR Chapter 1.

(2) A parent or a LEA may initiate a due process hearing on any of the matters described in the written notice relating to identification, evaluation or educational placement of a

child with a disability or the provision of FAPE to the child or the refusal to initiate or change the identification, evaluation, or educational placement of the child.

(3) When a hearing is initiated, the LEA shall inform the parent of the availability of mediation to resolve the dispute.

(4) The LEA shall inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information or if a parent or LEA initiates a hearing.

Section 9. [6.] Mediation rights. (1) The mediation process, if chosen, shall:

(a) be voluntary;

(b) not be used to deny or delay a parent's right to a due process hearing under Sections 5 and 7 of this administrative regulation or 34 CFR 300.507; or to deny any other rights afforded under this administrative regulation or IDEA Subpart E; and

(c) be conducted by a qualified and impartial mediator trained in effective mediation techniques.

(2) The Kentucky Department of Education shall maintain a list of qualified mediators who shall:

(a) not be an employee of the Kentucky Department of Education or the LEA that is involved in the education or care of the child; [:]

~~[1. any LEA or state agency described in 34 CFR Section 300.194; or~~

~~2. any part of the Kentucky Department of Education that is providing direct services to a child who is the subject of the mediation process;]~~

(b) be chosen at random for the mediation process; and

(c) not have a personal or professional conflict of interest.

1 (3) The Kentucky Department of Education shall bear the cost of the mediation process.

2 (4) The sessions in the mediation process shall be:

3 (a) scheduled in a timely manner not to exceed sixty (60) days; and

4 (b) held at a location that is convenient to both parties to the dispute.

5 (5) In a mediation session in which a resolution is reached by the parties, a legally
6 binding written agreement shall be executed that:

7 (a) sets forth the resolution and a timeline in which it shall be implemented;

8 (b) states that all discussions that occurred in the mediation process shall be confidential;
9 and

10 (c) may not be used as evidence in any subsequent due process hearing or civil
11 proceeding.

12 (6) Both the parent and a representative of the LEA who has the authority to bind the
13 LEA shall sign the agreement. The agreement shall be enforceable in any state court of
14 competent jurisdiction or in a district court of the United States.

15 Section 10. Dispute resolution. (1) Within fifteen (15) days of receiving notice of parental
16 request for a due process hearing, the LEA shall convene a meeting with the parent and
17 the relevant member or members of the ARC who have specific knowledge of the facts
18 identified in the due process hearing request. The parent and the LEA shall determine the
19 relevant ARC members to attend the resolution session. A representative of the LEA
20 who has decision-making authority on behalf of the LEA must also attend this meeting.
21 An attorney for the LEA shall not attend the meeting unless an attorney accompanies the
22 parent.

23 (2) The purpose of this meeting is:

1 (a) to allow the parents to discuss their due process hearing request;

2 (b) to discuss the facts that formed the basis of the request; and

3 (c) to give the LEA an opportunity to resolve the complaint.

4 (3) This meeting shall not take place if the parents and the LEA agree in writing to waive
5 the meeting or agree to use the mediation process.

6 (4) If the parties reach a resolution to the dispute, the parties shall execute a legally
7 binding agreement that is:

8 (a) signed by both the parent and a representative of the LEA who has the authority to
9 bind the LEA; and

10 (b) is enforceable in any state court of competent jurisdiction or a district court of the
11 United States.

12 (5) The dispute resolution agreement may be voided by either party within three (3)
13 business days of the agreement's execution.

14 (6) If the LEA has not resolved the complaint to the satisfaction of the parents within
15 thirty (30) days of the receipt of the due process hearing request, the due process hearing
16 may occur.

17 (7) The timeline for the resolution of the due process hearing shall begin at the expiration
18 of the thirty (30) day timeline, except for adjustments allowed in subsection (11) below.

19 (8) The failure of the parent filing the due process hearing request to participate in the
20 resolution meeting shall delay the timelines for the resolution process and the due process
21 hearing until the meeting is held unless:

22 (a) the parties have jointly agreed to waive the resolution process or use mediation; or

23 (b) the LEA has not resolved the due process complaint to the satisfaction of the parent

1 within thirty (30) days of the receipt of the due process hearing request in which case the
2 due process hearing may occur.

3 (9) If the LEA is unable to obtain the participation of the parent in the resolution meeting
4 after reasonable efforts have been made and documented, the LEA may request, at the
5 conclusion of the thirty (30) day period, that a hearing officer dismiss the parent's due
6 process hearing request.

7 (10) If the LEA fails to hold the resolution meeting within fifteen (15) days of receiving
8 the notice of a parent's due process hearing request or fails to participate in the resolution
9 meeting, the parent may seek the intervention of a hearing officer to begin the due
10 process hearing timeline.

11 (11) The forty-five (45) day timeline for the due process hearing starts the day after one
12 of the following events:

13 (a) both parties agree in writing to waive the resolution meeting;

14 (b) after either the mediation or resolution meeting starts but before the end of the thirty
15 (30) day period, the parties agree in writing that no agreement is possible; or

16 (c) if both parties agree in writing to continue the mediation at the end of the thirty (30)
17 day resolution period, but later the parent or the LEA withdraws from the mediation
18 process.

19 Section 11. [7.] Hearing rights. (1) The parent of a child with a disability or the attorney
20 representing the child or the LEA filing the request for a hearing shall provide notice to
21 the Kentucky Department of Education, to request a hearing. The notice shall contain:

22 (a) the name of the child;

23 (b) the address of the residence of the child;

- 1 (c) the name of the school the child is attending;
- 2 (d) a description of the nature of the problem; and
- 3 (e) facts relating to the problem and a proposed resolution to the extent known and
- 4 available to the parents at the time.
- 5 (2) The Kentucky Department of Education shall provide a model form, entitled “*Request*
- 6 *for a Due Process Hearing*”, containing these requirements to assist parents in filing a
- 7 due process hearing.
- 8 (3) A party shall not have a due process hearing until the party, or the attorney
- 9 representing the party, files a notice that contains the information listed in subsection (1)
- 10 above. This notice shall be provided to the other party and to the Kentucky Department
- 11 of Education.
- 12 ~~[(3) The Kentucky Department of Education shall not deny or delay a parent’s right to a~~
- 13 ~~due process hearing for failure to provide the notice in 707 KAR 1:340, Section 7 (1) and~~
- 14 ~~(2).]~~
- 15 (4) The procedures included in KRS Chapter 13B and IDEA Subpart E shall apply to a
- 16 due process hearing.
- 17 Section 12. [8.] Appeal of decision. (1) A party to a due process hearing that is aggrieved
- 18 by the hearing decision may appeal the decision to members of the Exceptional Children
- 19 Appeals Board as assigned by the Kentucky Department of Education. The appeal shall
- 20 be perfected by sending, by certified mail, to the Kentucky Department of Education a
- 21 request for appeal, within thirty (30) calendar days of date of the hearing officer’s
- 22 decision.
- 23 (2) A decision made by the Exceptional Children Appeals Board shall be final unless a

1 party appeals the decision to state circuit court or federal district court.

2 (3) Except as provided in 707 KAR 1:340, Sections 13, ~~[10 and 12]~~, during the pendency
3 of any administrative or judicial proceeding, including the dispute resolution meeting, the
4 child involved in the hearing or appeal shall remain in the child's [his] current
5 educational placement, unless the LEA and the parent agree to another placement.

6 However, the child shall not be required to remain in the child's current educational
7 placement if the complaint involves an application for initial services for a child that is
8 transitioning from the early intervention program into preschool and the child is no
9 longer eligible for the early intervention program due to age. In that case the LEA shall
10 not be required to provide the early intervention services the child had been receiving but
11 would be required to provide any special education and related services that the child is
12 eligible for and that are not in dispute between the parent and the LEA.

13 (4) If the hearing involves an application for initial admission to public school, and if
14 there is consent of the parents, the child shall be placed in the public school until the
15 proceedings are final.

16 ~~[Section 9. Representation of children. (1) A LEA shall ensure the rights of a child are~~
17 ~~protected by determining an educational representative for the child. A LEA shall~~
18 ~~appoint a surrogate parent to make educational decisions for the child if:~~

19 ~~(a) no parents as defined in 707 KAR 1:280 can be identified;~~
20 ~~(b) a LEA, after reasonable efforts, cannot discover the whereabouts of the parents; or~~
21 ~~(c) the child is a ward of the state.~~

22 ~~(2) A LEA shall have a procedure for determining whether a child needs a surrogate~~
23 ~~parent for assigning a surrogate parent to the child. The educational representative of the~~

~~child shall have all the rights afforded parents under Part B of IDEA and 707 KAR Chapter 1 to make decisions about educational issues for a child and to give written informed consent when necessary under administrative regulation.~~

~~(3) A LEA shall have a procedure for selecting surrogates. A surrogate:~~

~~(a) shall not be an employee of the Kentucky Department of Education, the LEA, or any other public agency that is involved in the education or care of the child;~~

~~(b) shall not have an interest that conflicts with the interests of the child; and~~

~~(c) shall have knowledge and skills that ensure adequate representation of the child.~~

~~(4) A surrogate parent may be an employee of a private agency that provides non-educational care for the child if that person meets the standards in this section. A person who is otherwise qualified to be a surrogate parent shall not be considered an employee of the LEA solely because he or she is paid by the LEA to serve as a surrogate parent.~~

~~(5) The surrogate parent may represent the child in all matters relating to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.~~

~~(6) When a child with a disability reaches the age of majority, all rights under 707 KAR Chapter 1 shall transfer from the parents to the child, unless the child has been declared incompetent under KRS Chapter 387 in a court of law. A LEA shall notify the child with a disability and the parents of the transfer of the rights.]~~

Section 13. ~~[10.]~~ Discipline procedures. (1) The ARC may consider any circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(2) School personnel may remove a student with a disability who violates a code of

student conduct from the student's placement to an appropriate interim alternative education setting, another setting, or suspension, for not more than ten (10) consecutive school days (to the extent those alternatives are applied to children without disabilities).

(3) School personnel may remove a student with a disability from the student's current placement for additional periods of time of not more than the (10) consecutive school days in the same school year for separate incidents of misconduct as long as those removals do not constitute a change in placement because of disciplinary removals.

(4) If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability (as described in Section (14) below), school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities for removals that would exceed ten (10) consecutive school days.

(5) After a child with a disability has been removed from the child's current placement for ten (10) school days in the same school year, educational services as described in paragraph (6) below shall be provided during any subsequent days of removal.

(6) A child with a disability that is removed from child's current placement for more than ten (10) consecutive school days shall:

(a) continue to receive a free, appropriate public education so as to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(b) receive, as appropriate, a functional behavioral assessment, and behavioral intervention services, and modification, that are designed to address the behavior

1 violation so that it does not occur.

2 (7) The services described in subsection (6) above may be provided in an interim
3 alternative educational setting.

4 (8) A LEA shall be required to provide educational services to a child with a disability
5 during periods of removal of ten (10) or less school days in the same school year if it
6 provides services to children without disabilities who are similarly removed.

7 (9) After a child with a disability has been removed from the child's current placement
8 for ten (10) school days in the same school year, and the current removal is for not more
9 than ten (10) consecutive school days and is not a change in placement because of
10 disciplinary removals, school personnel, in consultation with at least one of the child's
11 teachers, shall determine the extent to which educational services explained in subsection
12 (6) are needed.

13 (10) If a removal is a change in placement because of disciplinary removals, the child's
14 ARC shall convene within ten (10) calendar days and shall determine the appropriate
15 educational services for the child.

16 ~~[(1) If the child with a disability is removed for more than ten (10) school days during a~~
17 ~~school year, a change of placement shall be considered to have occurred for purposes of~~
18 ~~disciplinary actions.~~

19 ~~(2) To the extent removal would be applied to children without disabilities, school~~
20 ~~personnel may remove a child with a disability from the child's current placement for not~~
21 ~~more than a total of ten (10) school days for a violation of school rules.~~

22 ~~(3) A child's ARC may order a change in placement of a child with a disability to an~~
23 ~~appropriate interim educational setting for the same amount of time that a child without a~~

~~disability would be subject to discipline, but for not more than forty-five (45) days, if:~~

~~(a) the child carries or possesses a weapon to or at: school; a school function; or school premises; or~~

~~(b) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function. An illegal drug shall not include a substance that is legally possessed or used under the supervision of a licensed health care professional or that is legally possessed or used under the authority of any other provision of the Controlled Substances Act, 21 U.S.C. Section 812 (c) or under any other provision of federal law.~~

~~(4) No later than ten (10) business days after commencing an action that results in a change of placement, the LEA shall convene an ARC to:~~

~~(a) develop a plan for conducting a functional behavior assessment, if an assessment has not been conducted;~~

~~(b) develop and implement a behavioral intervention plan if a functional behavioral assessment has already been conducted; or~~

~~(c) review and modify the assessment and the plan, as necessary, to address the behavior if a functional behavioral assessment has been conducted and a behavioral intervention plan has been developed.~~

~~(5) As soon as practicable after developing the functional behavioral assessment described in Section 10 (4)(a), and completing the assessments required by the plan, the LEA shall convene an ARC to develop appropriate behavioral interventions to address the behavior and shall implement those interventions.~~

~~(6) A due process hearing officer may order a change in placement of a child with a~~

~~disability to an appropriate interim alternative educational setting for not more than forty-five (45) days if the hearing officer, in an expedited due process hearing:~~

~~(a) determines that the LEA has demonstrated by substantial evidence (i.e., beyond a preponderance of the evidence) that maintaining the current placement of the child is substantially likely to result in injury to the child or to others;~~

~~(b) considers the appropriateness of the child's current placement;~~

~~(c) considers whether the LEA has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and~~

~~(d) determines the interim alternative educational setting that is proposed by the school personnel who have consulted with the child's special education teacher, meets the requirements contained in 707 KAR 1:340, Section 10 (7).~~

~~(7) An interim alternative educational setting in which a child is placed shall:~~

~~(a) enable the child to continue to progress in the general curriculum;~~

~~(b) enable the child to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in the IEP; and~~

~~(c) include services and modifications to address the behavior to prevent the behavior from recurring.]~~

Section 14. Manifestation determination. (1) Within ten (10) school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the relevant members of the child's ARC, as determined by the LEA and the parent, must convene a meeting to review all relevant information in the student's

file, including the child's IEP, any teacher observations, teacher-collected data, and any relevant information provided by the parents to determine:

(a) if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability; or

(b) if the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct shall be determined to be a manifestation of the child's disability if the ARC determines that either condition in (1) (a) or (b) above was met.

(3) If the ARC determines that the condition described in (1) (b) above was met, the LEA shall take immediate steps to remedy those deficiencies.

(4) If the ARC determines that the conduct was a manifestation of the child's disability, the ARC shall:

(a) conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred and had implemented a behavioral intervention plan for the child, or review the behavioral intervention plan, (if one had already been developed) and modify it, as necessary, to address the behavior; and

(b) return the child to the placement from which the child was removed unless the LEA and the parent agree to a change of placement as part of the modification of the behavioral intervention plan or because of the special circumstances explained in subsection (5) below.

(5) School personnel may remove a child with a disability to an interim alternative educational setting for not more than forty-five (45) school days without regard to

1 whether the behavior of a manifestation of the child's disability if the child:

2 (a) carries a weapon to or possesses a weapon at school, on school premises, or to or at a
3 school function under the jurisdiction of the Kentucky Department of Education or the
4 LEA;

5 (b) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled
6 substance while at school, on school premises, or at a school function under the
7 jurisdiction of the Kentucky Department of Education or the LEA; or

8 (c) has inflicted serious bodily injury upon another person while at school, on school
9 premises, or at a school function under the jurisdiction of the Kentucky Department of
10 Education or the LEA.

11 (6) On the date on which a decision is made to make a removal that constitutes a change
12 of placement of a child with a disability because of a violation of the code of student
13 conduct, the LEA shall notify the parents of the decision and provide the parents with a
14 copy of the procedural safeguards as contained in Section 3.

15 (7) The ARC of the child shall determine the interim alternative educational setting and
16 the services for any child removed under Section 13 (4), (9) and Section 14 (5).

17 ~~[Section 11. Manifestation determination review. (1) If an action is contemplated that~~
18 ~~will result in a change of placement for a child with a disability who has engaged in~~
19 ~~behavior that violated any rule or code of conduct of the LEA that applies to all children:~~

20 ~~(a) not later than the date on which the decision to take action is made, the parents shall~~
21 ~~be notified of the decision and provided with a copy of procedural safeguards; and~~

22 ~~(b) immediately, if possible, but in no case later than ten (10) school days after the date~~
23 ~~on which the decision to take that action is made, a review by the ARC and other~~

1 ~~qualified personnel shall be conducted of the relationship between the child's disability~~
2 ~~and the behavior subject to the disciplinary action.~~

3 ~~(2) In conducting the review, the ARC may determine that the behavior of the child was~~
4 ~~not a manifestation of the child's disability if:~~

5 ~~(a) the ARC first considers, in terms of the behavior subject to the disciplinary action, all~~
6 ~~relevant information including evaluation and diagnostic results, relevant information~~
7 ~~supplied by the parents, observation of the child and the child's IEP and placement;~~

8 ~~(b) after the review of this information, the child's IEP and placement are reviewed in~~
9 ~~relationship to the behavior subject to the disciplinary action to determine if the IEP and~~
10 ~~placement were appropriate and the specially designed instruction and related services,~~
11 ~~supplementary aids and services and the behavior intervention strategies were provided~~
12 ~~consistent with the child's IEP and placement; and~~

13 ~~(c) the ARC determines if the child's disability impaired the ability of the child to~~
14 ~~understand the impact and consequences of the behavior and if the child's disability~~
15 ~~impaired the ability of the child to control the behavior.~~

16 ~~(3) If the ARC determines that any of the standards in subsection (2) were not met, the~~
17 ~~behavior shall be considered a manifestation of the child's disability.~~

18 ~~(4) If the ARC identifies any deficiencies in the child's IEP or placement or in its~~
19 ~~implementation, the LEA shall take immediate steps to remedy those deficiencies.~~

20 ~~(5) If after the manifestation determination review, the ARC determines the behavior was~~
21 ~~not a manifestation of the child's disability, the relevant disciplinary procedures~~
22 ~~applicable to all children may be applied to the child in the same manner in which they~~
23 ~~would be applied to children without disabilities.~~

~~(6) If the LEA initiates disciplinary procedures applicable to all children, it shall ensure that all special education and disciplinary records are transmitted to the school personnel making the final determination regarding the disciplinary actions as to the child with disabilities.~~

~~(7) A parent may request a due process hearing to contest the decision reached in a manifestation determination review or with any decision regarding placement under this section. The hearing shall be arranged in an expedited manner.]~~

Section 15. Appeals from placement decisions. (1) The parent of a child with a disability who disagrees with any decision regarding placement under Section 13 or Section 14 or the manifestation determination in Section 14 (1) (2) , or a LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others may request a hearing by filing using the procedures contained in Section 8 and Section 11.

(2) A hearing officer shall hear and make a determination regarding an appeal requested in (1).

(3) In making a determination, the hearing officer may order a change in placement of a child with a disability. The hearing officer may:

(a) return the child to the placement from which the child was removed; or

(b) order a change in placement of the child to an appropriate interim alternate educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement is substantially likely to result in injury to the child or others.

(4) When an appeal under this section has been requested, the child shall remain in the

interim alternate educational setting pending the decision of the hearing officer, or until the expiration of the time provided for in Section (3) (b), whichever occurs first, unless the parent and the LEA agree otherwise.

(5) An appeal under this section shall:

(a) be conducted in an expedited manner;

(b) shall occur within twenty (20) school days from the date of the request; and

(c) shall result in a determination within ten (10) school days after the hearing.

~~[Section 12. Challenges to placement in an interim alternative educational setting and manifestation determinations.~~

~~(1) If a parent requests a hearing to challenge the placement of his child in an interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting until the decision is final or until the expiration of the time period for the placement, whichever occurs first, unless the parent and the LEA agree otherwise.~~

~~(2) If a child is placed in an interim alternative educational setting and school personnel propose to change the child's placement after expiration of the time period, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (i.e., the child's placement prior to the interim alternative educational setting) unless the school personnel maintain that it is dangerous for the child to be in the current placement, in which case the LEA may request an expedited due process hearing.~~

~~(3) A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated a rule or code of conduct of the~~

1 ~~LEA, may assert any of the protections provided for in this administrative regulation if~~
2 ~~the LEA had knowledge that the child was a child with a disability before the behavior~~
3 ~~that precipitated the disciplinary action occurred.]~~

4 Section 16. ~~[13.]~~ Basis of knowledge. (1) A LEA shall be deemed to have knowledge
5 that a child is a child with a disability if:

6 (a) the parent of the child has expressed concern in writing (or orally if the parent cannot
7 express it in writing) to supervisory or administrative personnel of the appropriate LEA,
8 or to the teacher of the child, that the child is in need of special education and related
9 services;

10 (b) ~~[(e)]~~ the parent of the child has requested an evaluation pursuant to the requirements
11 in 707 KAR 1:300; or

12 ~~[(b) the behavior or performance of the child demonstrates the need for these services, in~~
13 ~~accordance with 707 KAR 1:280;]~~

14 (c) ~~[(d)]~~ the teacher of the child, or other personnel of the LEA, has expressed specific
15 concern about ~~the~~ a pattern of behavior or performance of the child directly to the
16 director of special education or other supervisory personnel of the LEA. ~~[to other~~
17 ~~personnel in accordance with the LEA's child find or special education referral system].~~

18 (2) A LEA shall not be deemed to have knowledge that a child may be a child with a
19 disability if, as a result of receiving information, the LEA:

20 (a) conducted an evaluation and determined the child was not a child with a disability; ~~or~~

21 (b) determined an evaluation was not necessary and provided notice to the parents of
22 these determinations; or

23 (c) parents refused to consent to an evaluation or refused initial services.

(3) If an LEA does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities.

(4) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation shall be conducted in an expedited manner. Until the evaluation is completed, the child shall remain in the educational placement determined by school authorities, which may include suspension or expulsion without educational services.

Section 17. ~~[14.]~~ [Reporting to law enforcement agencies. (1) Notwithstanding any provisions of 707 KAR Chapter 1, an agency may report a crime committed by a child with a disability to appropriate authorities.

(2) If a LEA reports a crime committed by a child with a disability, it shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to the extent the transmission is permitted by the Family Educational Rights and Privacy Act, 20 U.S.C. Section 1232g.

Section 18. ~~[16.]~~ Incorporation by reference. (1) The “*Request for a Due Process Hearing*” dated February 2007 ~~[July 14, 2000]~~, is ~~[hereby]~~ incorporated by reference.

(2) This document may be inspected, copied, or obtained, subject to applicable copyright law, ~~[and copied]~~ at the Division of Exceptional Children Services, Department of Education, Capital Plaza Tower, 500 Mero Street, 8th Floor, Frankfort, Kentucky, Monday through Friday, 8:00 a.m. through 4:30 p.m.